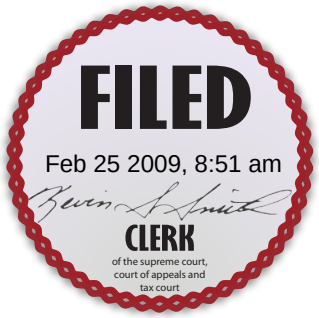

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IN THE
COURT OF APPEALS OF INDIANA

TROY FAULKENBURG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 88A01-0807-CV-308
	)	
GERALD AUSTIN NANCE,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WASHINGTON SUPERIOR COURT
The Honorable Frank Newkirk, Jr., Judge
Cause No. 88D01-0606-PL-165

February 25, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Troy Faulkenburg appeals the trial court's judgment awarding damages to Gerald Nance for conversion of Nance's propane gas tank and timber, unpaid rent, damage to Nance's real estate, and Nance's attorney fees and travel expenses. Faulkenburg argues the trial court erred by denying his counterclaim and the evidence does not support the award of damages to Nance. We affirm.

FACTS AND PROCEDURAL HISTORY

Nance moved to Florida, but still owned twenty-one acres at the corner of Voyles Road and Mann Road in Pekin, Indiana. There was a mobile home on the property that had been vandalized and burned. Nance put an advertisement in the newspaper, seeking to hire someone to clean up his property. He also put up a "for sale" sign, asking $125,000 for the property. Faulkenburg responded to Nance's advertisement and also expressed interest in buying the property. They agreed that Faulkenburg could use the property for six months free of rent if he cleaned up the property; thereafter, Faulkenburg was to pay $200 per month in rent.

Faulkenburg took possession of the property in the fall of 2004. He cleared away the burned trailer, mowed the grass, and fenced in part of the property. Meanwhile, Faulkenburg and Nance were negotiating the sale of the property. However, the relationship deteriorated when neighbors told Nance that Faulkenburg was logging the property.

Nance called the police and reported that Faulkenburg was stealing timber from his property. Officer Buck Backherms went to the property to investigate. He noticed an area that looked like it had been cleared, but he did not see any evidence of present

logging. Faulkenburg told Officer Backherms he had "bought the property on contract." (Tr. Vol. 1 at 60.)[1] Based on Faulkenburg's representations, Officer Backherms believed it was a civil matter and did not investigate further.

On August 9, 2005, Nance filed a statement of claim in small claims court, alleging Faulkenburg had logged three acres of his property, sold a propane gas tank belonging to Nance, failed to pay rent, and had damaged the property. Faulkenburg filed a counterclaim for improvements he made to the property.

On January 3, 2006, Nance was granted permission to remove the case to the plenary docket. On April 10, 2006, he filed an amended complaint in the Washington Superior Court, and the amended complaint was re-issued on June 9, 2006. As of July 31, 2006, Faulkenburg had not filed an answer, and Nance filed a motion for default judgment. Thereafter, Faulkenburg filed an answer, which did not include any affirmative defenses or counterclaims. On November 27, 2006, the trial court entered a default judgment for Nance and scheduled a hearing on damages. Faulkenburg filed a motion to reconsider, which the trial court took under advisement pending the hearing on damages.

The hearing began on January 3, 2007, was continued several times, and ultimately concluded on October 5, 2007. On October 16, 2007, the trial court granted Faulkenburg's motion to reconsider and set aside the default judgment. The order further stated:

[1] The transcript consists of two volumes that each begin with page 1, in violation of Ind. Appellate Rule 28(A)(2). Although the volumes are not numbered properly, we will refer to the volumes as they are numbered.

> 16. The Court file and chronological case summary indicate that no counterclaim was filed in this action, but that attorney Jay D. Allen had filed a counterclaim August 17, 2005 in the original small claim case, which was 88D01-0508-SC-770.
>
> * * * * *
>
> 18. Although evidence relating to the Counterclaim was presented at the trial, the counterclaim filed in 88D01-0508-SC-770 was not properly at issue during the trial and will not be granted or denied at this time.

(Appellant's App. at 21.)

On October 31, 2007, Faulkenburg filed a counterclaim. Nance filed an "Objection to Counterclaim and Motion to Strike." (*Id*. at 25.) On November 14, 2007, the trial court issued an order denying the counterclaim:

> 10. Although the evidence related to the Counterclaim was presented at the trial without objection, the counterclaim filed in 88D01-0508-SC-770 was not properly at issue during the trial and will not be granted.
>
> 11. The Defendant's request to file and litigate a counterclaim at this point is denied, however all evidence presented by the Defendant concerning his costs in improving the property may be considered for set off purposes if the Plaintiff is entitled to damages and if the Defendant is entitled to set off.

(*Id*. at 28.)

On December 28, 2007, the trial court awarded Nance:

a. Damages for rent totaling $1000.00,
b. Expenses to mitigate damages, including travel, totaling $4000.00,
c. Treble Damages and attorney fees for the conversion and removal of a gas tank totaling $3000.00,
d. Treble Damages for the conversion and removal of timber totaling $6000.00.
e. Damage to real estate totaling $1000.00.

(*Id*. at 30-31.) The trial court also found Faulkenburg was not entitled to a set off: "Although the defendant, Troy Faulkenburg, spent money and time cleaning and

improving the property, he was credited with rent for the first six (6) months and asked to stop work and leave the property after that." (*Id*. at 31.)

DISCUSSION AND DECISION

1. Denial of Counterclaim

Faulkenburg asserts the trial court erred by denying his counterclaim, arguing in effect that his counterclaim was tried by consent. *See* Ind. Trial Rule 15(B) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). Although the trial court denied Faulkenburg's counterclaim, it considered the same evidence as a possible set off of Nance's claim. Therefore, if the trial court's decision to deny a set off is supported by the record, Faulkenburg suffered no prejudice from any error in the denial of his counterclaim. *See Neese v. Kelley*, 705 N.E.2d 1047, 1050 (Ind. Ct. App. 1999) ("Indiana adheres to the rule requiring a showing of prejudice before reversal may be granted.").

The trial court found Faulkenburg was not entitled to the value of the improvements, because they were made pursuant to an agreement in which Faulkenburg was allowed to use the property for six months free of rent.[2] The existence and terms of this agreement were undisputed; however, Faulkenburg argues the six months of free rent was not a benefit:

> No benefit whatsoever was bestowed upon Faulkenburg until he had expended several thousand dollars and weeks of labor to improve the

[2] The record does not reflect whether the $200 per month rent that came into effect after the first six months was a market rate or a below market rate in further consideration of the work Faulkenburg was to do on the property.

> property. In fact, no benefit was realized by Faulkenburg until May 2005, when he was first able to place a mobile home on the property, at which point he began receiving rent from his brother, Leon.

(Appellant's Br. at 13.)

Faulkenburg argues Nance was unjustly enriched by the improvements; however, the improvements were the subject of an express agreement. *See Bergerson v. Bergerson*, 895 N.E.2d 705, 714 (Ind. Ct. App. 2008) (tenants who made improvements to property in anticipation that they would buy it could not recover under unjust enrichment theory because lease agreement had express provision that any improvements would belong to landlord). Faulkenburg's argument amounts to a claim that he received inadequate consideration; however, it is "well settled that it is not proper for courts to inquire into the adequacy of consideration." *Auburn Cordage, Inc. v. Revocable Trust Agreement of Treadwell*, 848 N.E.2d 738, 748 (Ind. Ct. App. 2006). If Faulkenburg spent more on improvements than he anticipated or was not able to make use of the property as soon as he would have liked, he made a poor deal; that does not unjustly enrich Nance or entitle Faulkenburg to a set off or damages. *See French-Tex Cleaners, Inc. v. Cafaro Co.*, 893 N.E.2d 1156, 1166 (Ind. Ct. App. 2008) (it is not the court's job to rewrite a lease to save a party from a bad deal).

2. Award of Damages

We will set aside a trial court's findings only if they are clearly erroneous. *Founders Ins. Co. v. Olivares*, 894 N.E.2d 586, 592 (Ind. Ct. App. 2008). We do not reweigh the evidence or judge the credibility of witnesses. *Randles v. Ind. Patient's Compensation Fund*, 860 N.E.2d 1212, 1230 (Ind. Ct. App. 2007), *trans. denied* 878

N.E.2d 205 (Ind. 2007). We will not reverse a damage award if it is within the scope of the evidence before the trial court. *Id.*

Nance testified there had been a propane gas tank on the property when Faulkenburg took possession of it, and the tank was no longer there when Faulkenburg vacated the premises. Nance valued the tank at $500 based on an inquiry to a gas company. The trial court applied Ind. Code § 34-24-3-1, which permits the court to award treble damages and attorney fees when the defendant's actions violate certain criminal statutes. The trial court awarded $3000 for conversion of the tank, presumably $1500 for the tank and $1500 for attorney fees.

Faulkenburg argues "Nance offered no testimony regarding actual pecuniary loss, nor as to its market value, viability for use, its age, whether he had added it to the property or whether it was merely a junk remnant of the burned out trailer that too was to be removed." (Appellant's Br. at 16.) Neither man testified that removing the tank was part of their agreement. Nance testified he believed his tank was worth $500, and Faulkenburg did not explore on cross-examination whether the figure he received from the gas company was for a comparable tank. Nor does he argue that $1500 is an unreasonable fee. Therefore, we cannot say the trial court erred.

Nance presented testimony from two neighbors who observed the logging of Nance's property. Karla Hedegard lives across from Nance's property, and her family had previously owned Nance's property for over 100 years. She testified Nance's property had been "mostly all woods," and timber had never been cut on the property since her family first purchased it in 1820. (Tr. Vol. 2 at 27.) The trees on the property

included maple, pine, poplar, walnut, red cedar, and oak. Hedegard testified a crew of four or five men worked from "sun up to sun down, every day for at least two months straight." (*Id*. at 28.) She saw at least two flatbed trailers piled high with logs leave Nance's property. After the logging, she went onto the land and counted only eighteen trees in a ten-acre area that had previously been densely wooded.

Debra Wynn lives near Voyles Road and would pass Nance's property on the way to work. She testified Nance's property had been "thick with trees" and there were "no bare spots." (*Id*. at 71.) She observed "obvious" logging on Nance's property. (*Id*. at 74.) She saw trucks fully loaded with trees on two or three occasions. After the logging, the wooded area was "thin;" previously, a person "could walk in there and there [were] places where it would be dark and now it's not." (*Id*. at 73.)

Faulkenburg notes Officer Backerms' testimony that he considered the logging a civil dispute; however, that was because Faulkenburg told Officer Backherms he had purchased the land. Faulkenburg also notes his own testimony that Hedegard had threatened him, but that is a request to judge her credibility, which we will not do. See *Randles*, 860 N.E.2d at 1230. The testimony of Hedegard and Wynn supports the trial court's determination that Faulkenburg had converted timber.

Robert Andis, who has over thirty years of experience in the logging industry, testified an average truck load of mixed hardwoods would be worth about $2000. Applying the treble damages statute, the trial court awarded $6000 for conversion of the trees, which is within the scope of the evidence.

Next, Faulkenburg argues "for the reasons set forth in Argument I above [the] trial court erred [by] awarding $1,000.00 for rent damages and $1,000.00 for damages to real estate." (Appellant's Br. at 17.) This appears to be a restatement of his argument that Nance was unjustly enriched, which we have rejected. Faulkenburg also argues there was no damage to Nance's property, which apparently is based on the fact that Nance eventually sold the land for $137,500, whereas he had previously offered the land for sale at $125,000. Nance testified he attempted to sell the property on his own for $125,000 without obtaining an appraisal. When negotiations fell through with Faulkenburg, he obtained the help of a realtor, who believed the property should be listed for $145,000. Nance testified he originally asked for $125,000 because he did not know the "real price" of his land, and he believed the realtor's opinion was more accurate. (Tr. Vol. 1 at 28.) Faulkenburg's argument is not supported by the evidence.

Finally, Faulkenburg argues the trial court erred by awarding Nance $4000 in travel expenses. Ind. Code § 34-24-3-1(4) authorizes an award of travel expenses to file papers and attend court proceedings. Nance testified he traveled from Florida to Indiana at least six times in connection with this case, and it cost $500 to $1000 each time. The trial court's award is within the scope of the evidence.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.